

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 03.10.2016

CORAM

THE HONOURABLE MR.JUSTICE T. MATHIVANAN

Civil Revision Petition (PD) No.3045 of 2013 &
M.P.No.1 of 2013

1. Kadirvel
2. Nagendran

... Petitioners

Versus

Muthulakshmi

... Respondent

Civil Revision Petitions filed under Article 227 of the Constitution of India to set aside the orders dated 26.06.2012 passed in I.A.No.229 of 2012 in O.S.No.57 of 2011 on the file of the learned District Munsif cum Judicial Magistrate, Kodumudi.

For Petitioners : Mr.M.Guruprasad

For Respondent : No appearance

ORDER

When this petition was taken up for hearing on 29.09.2016, the learned counsel for the petitioners was present and advanced his arguments. On the

other hand, there is no representation on behalf of the respondent, inspite of service of notice. Hence, respondent was called absent. Today, this matter stands posted for Orders.

2. This memorandum of revision has been directed against the fair and decretal order dated 26.06.2012 and made in the application in I.A.No.229 of 2012 in the suit in O.S.No.57 of 2011 on the file of the District Munsif cum Judicial Magistrate, Kodumudi.

3. The revision petitioners herein are the defendants in the suit, whereas the respondent is the plaintiff. The respondent seems to have filed the above suit as against the revision petitioners/defendants for partition. The revision petitioners had also contested the suit by filing their written statement. After formulating necessary issues based on the pleadings of the parties concerned, the suit was for trial. At that time, the respondent had filed an application in I.A.No.229 of 2012 under Order XVIII Rule 1 of the Code of Civil Procedure to direct the defendants to lead the evidence at first. This petition was strenuously resisted by the revision petitioners. However, the learned trial Judge had proceeded to allow the petition on the following grounds :

a) Earlier partition as pleaded by the defendants, was not admitted by the

plaintiff. According to them, the burden is heavily rested upon the defendants to prove the fact that already a partition was effected between the parties on 02.01.2001 in respect of the suit property. The defendants are, therefore, under the necessity to prove the alleged partition.

b) when the burden of proof is heavily rests on the defendants to prove the earlier partition said to have taken place on 02.01.2001, it is appropriate that the defendants have to begin the trial.

The above said order seems to have been passed on 26.06.2012. Impugning the said order, the defendants stand before this Court with this revision.

4. Heard Mr.M.Guruprasad, learned counsel appearing for the petitioner. There is no representation for the respondent.

5. No doubt, the revision petitioners/defendants and respondent/plaintiff are brothers and sister. According to the respondent, their father one Karuppanna Pillai had purchased the suit property on 07.11.1982. Till the life time of the said Karuppanna Pillai, he was enjoying the suit property without any encumbrance. He had passed away some 15 years back, leaving behind the plaintiff and the defendants as his legal heirs to enjoy the property. Their mother Dhanalakshmi had also died 10 years back. According to the respondent, she

and the revision petitioners are the legal heirs to enjoy the property without any permanent partition. Under this circumstance, seeking the relief of partition, she has come forward with the above suit on the file of the learned District Munsif cum Judicial Magistrate, Kodumudi.

6. It is the specific case of the revision petitioners that on 02.01.2001, in the presence of village panchayatdars, the suit property was divided into two portions between them. It is also their case that since the respondent/plaintiff was given in marriage after spending a huge amount and after providing sufficient sreedhana properties, she was not entitled to get any share in the suit properties. Besides this she was also given a sum of Rs.20,000/- in proportionate to her share of the immovable property by the revision petitioners. Only on this factual issue, the respondent/plaintiff, prior to the commencement of trial, had filed the above said petition under Order XVIII Rule 1 of the Code of Civil Procedure to direct the revision petitioners to lead the evidence at first as they had contended that there was an earlier partition between them on 02.01.2001. It is also the case of the respondent/plaintiff that if the revision petitioners/defendants are able to prove their earlier partition by leading adequate and acceptable evidence, then the respondent/plaintiff, will be losing her case. The contention of the respondent/plaintiff was accepted by the learned trial Judge and he therefore had directed the revision petitioners to lead the evidence at first.

7. The learned counsel for the petitioners has placed reliance upon the judgment reported in **2010 – 5 – L.W. 454 (Bajaj Auto Ltd., Bombay Pune Road, Akurdi Pune 411035 and another Vs. TVS Motor Company Ltd).**

8. Rule 1 of Order XVIII enact as under

“Right to begin - The plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant, the plaintiff is not entitled to any part of the relief which he seeks in which case, the defendant has the right to begin.”

9. In so far as the present case on hand is concerned, the petitioners, who are the defendants in the suit have admitted that the suit property was purchased by their father and till the death of their parents, they were in possession and enjoyment of the suit property. But the claim of 1/3rd share made by the plaintiff was specifically denied by them saying that on 02.01.2001, the suit property was divided between them in the presence of the village panchayatdars and in

equivalent there of, they had given a sum of Rs.20,000/- to the respondent/plaintiff. The revision petitioners have admitted the other allegations made by the respondent in the plaint. Under this circumstance, this Court finds that when the revision petitioners admit the allegations made by the plaintiff in the plaint, they cannot take a different set of plea contrary to their express admission. When such being the case, the onus of proving such facts is lying on them. The explanation of Order XVIII Rule 1 provides that the defendant should begin the evidence first would be applicable, otherwise, the general principle in which Order XVIII Rule 1 of the Code of Civil Procedure will be applicable. This principle is laid down by Orissa High Court in **Jayaram Sahoo vs. Banamali Sahoo (2013(2) Civ LJ 230 (Ori))**.

10. In **Niranjan Nath and others Vs. Rabindra Nath Sharma and others (AIR 2011 Ori 190)**, the Orissa High Court held that:

“Dealing with the contentions made by the learned counsel for the parties to the effect that filing of affidavit evidence by the plaintiffs under Order XVIII Rule 4 CPC amounts to beginning of adducing of evidence in terms of Order XVIII Rule 1 of CPC for which the plaintiff cannot be permitted to ask the defendants to begin the evidence first. It may be observed that right to begin, as provided under Order XVIII Rule 1 of CPC, has nothing to do with the requirement of filing of the affidavit

of examination-in-chief as prescribed under Section 18, Rule 4 of CPC. Order XVIII Rule 1 of the CPC refers to right of parties to begin. Order XVIII Rule 4 of the CPC requiring the parties to file affidavit caters to the convenience of the parties and is aimed at expeditious disposal of cases.”

11. Under this context, S.102 of the Evidence Act is also very much relevant to be extracted.

Section 102 of the Evidence Act enact as under :

“The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.”

The principle and scope lying behind Section 102 of the Evidence Act is that the best test for ascertaining, on which side the burden of proof lies on a party, that party must fail if he does not discharge the burden by giving evidence. This principle is laid down in **Radhamohan Vs. Kamaldhari (1936 AIR page 243)**

12. The best test for ascertaining, on whom the burden of proof lies, are, to consider first which party would succeed if no evidence were given on either side; and secondly, what would be the effect of striking out of the record the allegation to be provided. The onus lies on which ever party would fail, if either of these

steps were pursued, this appreciation of law has been laid down by the Andhra Pradesh High Court in

Mills Vs. Barber 1 M & W 427 = R.Jayalakshivamma v. Election Tribunal-cum-Senior Civil Judge, Pungunur – 2004(5) Andh LT 400 (AP).

13. Here the revision petitioners have specifically contended that a partition was effected between them on 21.01.2001 in the presence of the village panchayatdars and they have also contended that the respondent/plaintiff was also given a sum of Rs.20,000/- on the same day in lieu of her share in the suit property. If this fact is able to be proved by the revision petitioners/ defendants, it is contended by the respondent/plaintiff that she would be losing her case and the suit is liable to be dismissed as the respondent/plaintiff has got no case to succeed. Under this circumstance, owing to the facts set forth above, the learned trial Judge, in the impugned order, has observed after placing reliance upon an unreported judgment of this Court in Kasinathan and another Vs. Palraj and others in the Second Appeal in S.A.No.283 of 2004 decided on 19.1.2010. Considering this aspect as enunciated under section 102 of the Evidence Act, the burden is heavily rested on the revision petitioners to prove the earlier partition and therefore, they have to lead the evidence at first, as rightly decided by the trial Court. Considering the above facts, this Court finds that the revision petition is

devoid of any merits and deserved to dismissed.

14. Accordingly, this revision petition is dismissed and the impugned order of the trial Court and made in I.A.No.229 of 2012 is confirmed. However, there shall be no order as to cost. Consequently, the connected miscellaneous petition is closed.

03.10.2016

Index:yes/no

Internet:yes

vrc

To

The District Munsif cum Judicial Magistrate,
Kodumudi.

T.MATHIVANAN, J.,

VRC

C.R.P.(PD) No.3045 of 2013

03.10.2016